WISCONSIN

DEPARTMENT OF WORKFORCE DEVELOPMENT
Division of Economic Support
Bureau of Welfare Initiatives

BWI OPERATIONS MEMO
No.: **99-19**
File: **2730** **2731**
Date: **03/17/99**
Non W-2 [x] W-2 [ ] CC [ ]
PRIORITY: URGENT

TO: **Economic Support Supervisors**
Economic Support Lead Workers
Training Staff
FSET Administrative and Provider Agencies
Child Care Coordinators
W-2 Agencies

FROM: Stephen M. Dow
Program Implementation Team
Policy Analysis and Program Implementation Section

SUBJECT: **MEDICAL ASSISTANCE (MEDICAID) DIVESTMENT - PROMISSORY NOTES AND ANNUITIES**

CROSS REFERENCE: **Medical Assistance (MA) Handbook**, Appendix 11.0.0 and 14.0.0.

EFFECTIVE DATE: This memo is meant to assist county and tribal staff in understanding existing policy. Therefore there is no new effective date. The current policy has been in effect since October 1, 1993.

PURPOSE

This memo provides information from recent fair hearing decisions that interpret Medicaid divestment policy.

BACKGROUND

Many questions have come into the Department regarding the use of promissory notes and annuities to shelter assets of institutionalized and waiver applicant/recipients in order to qualify for Medical Assistance (Medicaid). For example, county and tribal departments of social/human services staff have asked whether any of the following arrangements are divestment:

1. A $20,000 promissory note from an institutionalized MA applicant to a relative that ‘forgives’ a portion of the debt and accrued interest each month until no portion of the $20,000 is ever repaid to the institutionalized MA recipient.

2. A promissory note in which the institutionalized person loans $50,000 to a close relative, charges no interest, and requires only $1 each month be repaid, until a lump sum payment is made in final month of the agreement.

3. An annuity in which the institutionalized MA applicant funds an annuity with $50,000 and is repaid $15 each month until the last month of the annuity (the anticipated life expectancy month) when the rest of the annuity is repaid to the MA recipient (the former applicant). Then the recipient takes the rest of the money and funds a similar annuity with a new life expectancy date based upon his current age.

POLICY

The **MA Handbook**, Appendix 14.2.1, defines divestment as the "transfer of income, non-exempt assets, and homestead property, which belong to an institutionalized person or his/her spouse or both . . .for less than the fair market value of the income or asset." The determining factor in deciding whether a transfer of assets is a divestment is whether the applicant/recipient received fair market value for the transfer.

In an effort to assure uniformity in the application of current policy on the treatment of annuities and promissory notes, the Department is disseminating 2 recent fair hearing decisions: MDV 30/35331 and MDV 30/35213. These are decisions from the Department of Administration's Division of Hearings and Appeals that provide guidance to local agency staff to determine when a promissory note or annuity is divestment.

Promissory Notes

Fair hearing decisions have found that divestment has occurred with promissory notes that have inadequate interest rates, that forgive a portion of the principal or that include a "balloon" payment. The basis for these decisions is that these are not fair market transactions, at arms length, which result in a note which would have value, and be saleable, to a third party. In other words, a note with only interest payments and no payments of principal, even if the principal is due within life expectancy, would also fail the fair market value test and be divestment under this analysis.

As one fair hearing examiner states, "It strains this examiner's credulity to be told that a note for which no principal is paid for five years after the date of the note and then only if the holder is still alive, he was 73 years old at the time the note was executed, is worth its face amount"

Annuities

The document signed was not an annuity since the substance of the repayments were not to be made in fixed periodic payments.

> "In administrative code an annuity is defined as 'a written contract under which in return for payment of a premium or premiums, an individual or individuals have the right to receive ***fixed, periodic payments for life or up to a fixed point in time***." Wisconsin Administrative Code HFS §103.065(3)(a) (emphasis added).

Something is "fixed" when it is "of an established, unchanging, or permanent character; settled; lasting; stable . . .keeping nearly the same relative position." The general use of annuities engenders fixed payments.

REVIEWS

As mentioned under "Effective Date", the policy described in this memo has existed since 10/01/93. If you are conducting a review for a case where the policy was not applied as described in this memo, apply the policy now. If, in applying the policy, you determine the recipient is no longer MA eligible, (1) provide regular timely notice of discontinuance, and (2) do **not** pursue recoupment.

FOR YOUR INFORMATION

The decisions attached to this Operations Memo are in appeal at circuit court.

CONTACT

If you have any questions about this Operations Memo, please contact the DES Call Center:

Phone: 608-261-6317
Fax: 608-261-6968
E-mail: carpolcc@dwd.state.wi.us

Attachments